No. 17-1656

IN THE

Supreme Court of the United States

VIOLET DOCK PORT, INC., L.L.C.,

Petitioner,

v.

ST. BERNARD PORT, HARBOR, & TERMINAL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY

Protecting private property against government redistribution has been an issue of national importance since our country's founding. Writing for a unanimous Court in 1829, Justice Story observed:

> We know of no case, in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been consistently resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.

Wilkinson v. Leland, 27 U.S. 627, 658 (1829). Justice Patterson, a New Jersey delegate to the Constitutional Convention, similarly explained that, when government takes property from one person to give it to another, "even upon complete indemnification," such act "ought to be viewed with jealous eyes, examined with critical exactness, and scrutinized with all the severity of legal exposition." *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 318 (1795). "An act of this sort deserves no favor; to construe it liberally would be sinning against the rights of private property." *Id.*

In the *Berman*, *Midkiff*, and *Kelo* trilogy, the Court liberally construed eminent domain powers, eroding the protection of the Public Use Clause to the point that many question whether it is still a limit on government authority. *See Berman v. Parker,* 348 U.S. 26 (1954)*; Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229 (1984)*; Kelo v. City of New London,* 545 U.S. 469 (2005). Petitioner and *Amici* have shown that courts are struggling to understand the role of the

Public Use Clause when the exercise of eminent domain powers is intended to benefit private interests.

Petitioner's case presents an egregious example. Respondent targeted a single property outside of a redevelopment plan. Respondent does not deny that a private actor—Associated—helped orchestrate the taking, intending to acquire the property under a long-term lease. If this taking is constitutional, it is hard to imagine one that is not.

Review is urgently needed to restore meaning to the Public Use Clause, to resolve conflicting authorities, and to establish meaningful limits on government eminent domain powers.

A. Review Is Needed to Resolve Conflicting Authorities on the Role of the Appellate Courts When Reviewing Public Use Challenges

To provide meaningful protection for property rights, appellate courts must play a role in reviewing public use challenges. A single, locally-elected trial judge is an insufficient guardian of the rights provided under the Fifth Amendment. Louisiana's refusal to allow for meaningful review of the trial court's public use determination stands in stark conflict with decisions of many sister states. Pet. at 14-18.

1. Respondent claims that Louisiana provides meaningful appellate review, but it does not. Respondent says Louisiana uses a two-step review. First, courts review as a matter of law "whether respondent's stated purpose for the taking . . . qualifies as a 'public purpose' within the meaning of the state and federal constitutions." Opp. at 11-12. Then, courts review "whether respondent's stated purpose matched its

actual intent," which is treated as an issue of fact subject to manifest error appellate review. Opp. at 12.

Respondent's standard is not consistent with the Louisiana Supreme Court's opinion, which focused entirely on the trial court's "factual determination" of Respondent's purpose, concluding it was not "manifestly erroneous." Pet. 13a ("we therefore affirm the finding that this taking was for a public purpose"). Nevertheless, Respondent's standard provides no meaningful appellate review.

By focusing the legal inquiry on the "stated purpose" for the taking, Respondent's standard "would place every house, every business, and all the property of the [jurisdiction], at the uncontrolled will of the temporary local authorities." *Yates v. City of Milwaukee*, 77 U.S. 497, 505 (1870). As Justice Scalia wrote for the Court when rejecting a stated purpose test in regulatory takings cases:

> [s]ince [a permissible] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025-26 n.12 (1992). A stated purpose test does not protect against impermissible private or pretextual takings.

The second step of Respondent's analysis fares no better, as it treats "public use" as a factual question of the "actual intent" of the government officials, with the answer determined by the trial judge with only limited appellate review. *See* Opp. at 8, 10, 26-37. The

present case illustrates the problems with that approach. The trial court's "findings" are nothing but bald conclusions, deferring to Respondent's stated purpose for the taking. Pet. 86a-88a.

Like Respondent, the trial court ignored Associated's role in the taking and plan to operate the property post-taking.[1] Instead, Respondent argues that the trial court's findings should be upheld because they were supported by after-the-fact testimony from Respondent's executive director and Associated's president, each of whom self-servingly denied having improper motives for taking Violet's property. Opp. at 7-8, 28. If such self-serving statements are enough to support a taking when faced with substantial evidence of benefits provided to a known private actor, all property is at risk of being redistributed by government to favored private entities. The constitutionality of a taking should not turn on the subjective intent or expressed motivations of government actors; it should be decided based on substance and objective evidence of what the government does.

2. Louisiana's approach is similar to that employed in Connecticut, but is in direct conflict with the standards applied in Hawaii, Illinois, Pennsylvania, and Rhode Island. Pet. at 14-18. Respondent's attempt to reconcile Louisiana's standard with that used in its

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[1] The cargo at Respondent's Chalmette Slip, Opp. at 4-5, 27, is handled by Associated, with Respondent receiving fees for services rendered. Thus, when Respondent discusses "growth," Opp. at 5, it is Associated that is expanding and hiring employees as a result of having additional facilities to run. *See* Pet. 99a-104a. Associated's growth is coming at the expense of destroying Violet's business.

sister states is based on mischaracterizations of the cited authorities. For example:

- ***Hawaii*** – Respondent acknowledges that the Hawaii Supreme Court requires courts to look behind the stated purpose for a taking, Opp. at 16-17, but overlooks the court's extensive record review to assess the validity of the taking, deferring only to true fact findings on specific points (regarding the roads at issue, rights of access, etc.); it did not defer to a broad public use conclusion. *See County of Hawaii v. C & J Coupe Family Ltd. Partnership,* 242 P.3d 1146, 1154-55 (Haw. 2010).

- ***Illinois*** – unlike the Illinois Supreme Court case Violet cited, Respondent's argument is based on an intermediate appellate court decision addressing an Illinois statute, not the Fifth Amendment. *See Enbridge Energy (Illinois) L.L.C. v. Kuerth*, 99 N.E.3d 210 (Ill. App. Ct. 2018).

- ***Pennsylvania*** – the cases Respondent cited do not address the standard for reviewing a public use determination. *See Denes v. Pennsylvania Turnpike Authority*, 689 A.2d 219, 221 (Pa. 1997) (reviewing compensation); *Reading Area Water Authority v. Schuylkill River Greenway Ass'n*, 100 A.3d 572, 580-84 (Pa. 2014) (interpreting a state statute).

- ***Rhode Island*** – the Rhode Island cases relied upon by Respondent address the standard for reviewing compensation awards, not public use determinations. *See, e.g., Conti v. Rhode Island Econ. Dev. Corp.*, 900 A.2d 1221, 1230 (R.I. 2006).

There is a clear conflict in authorities that will only be resolved by this Court's intervention.

3. Respondent's attempt to equate the public use analysis with a question of intent is misguided. *See* Opp. at 1, 20-22. This Court has never held that a government official's subjective intent controls whether a taking is permissible. The public use analysis requires consideration of all evidence, including the circumstances surrounding the taking, whether it is part of a comprehensive development plan, whether there was a known private beneficiary of the taking, the likely effects of the taking, as well as any other relevant factors.

The determination whether a valid "pubic use" exists is the legal conclusion drawn from the underlying facts and circumstances. This Court should grant review and reject the Louisiana Supreme Court's contrary approach.

B. Review Is Needed to Resolve Conflicting Authorities Regarding the Limits of Eminent Domain Powers

Respondent ignores this Court's authorities addressing limits on government power, including *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896), *Webb's Famous Pharmacies, Inc., v. Beckwith*, 449 U.S. 155 (1980), and Justice Kennedy's *Kelo* concurrence. Respondent also ignores *Amici's* scholarly briefs. Finally, Respondent's attempt to explain away the conflict in state court and lower federal court authorities regarding the scope of government power are all based on Respondent's mistaken belief that the trial court's public use finding is conclusive on the issue.

1. The Louisiana Supreme Court's decision conflicts with *Rhode Island Economic Dev. Corp. v. The Parking Company, L.P.*, 892 A.2d 87, 96, 103 (R.I. 2006). Government may not take non-blighted property to conduct the same or similar business. *Id.* No matter how Respondent tries to spin the facts, Respondent and Associated are now operating Violet's docks as their own. Violet was attempting to expand cargo operations, placing it in direct competition with Respondent.[2] Regardless whether Respondent lay-berthed ships pre-taking, Respondent intended to (and is) layberthing the Navy ships Violet formerly serviced. This is a taking to use Violet's docks and property in ways similar to their pre-taking use. This would be barred in Rhode Island.

2. This case also conflicts with *Southwestern Ill. Dev. Auth. v. National City Environmental, L.L.C.*, 766 N.E.2d 1, 8 (Ill. 2002). Respondent tries to distinguish the Illinois Supreme Court's decision by arguing that expanding the docks at its existing facility was not feasible because the real reason for the taking was Respondent's need for additional lay down space—*i.e.* land. Opp. 5 & n.1. This argument directly contradicts what Respondent told the State in its funding application, when it described Violet's docks as the "best attribute" of the property. L-125. Respondent's new argument also flies in the face of the trial court's finding that "[t]he limited amount of uplands of the property would not support a large scale cargo terminal." Pet. 97a. If Respondent needed additional land for its existing operations (as it now claims), Respondent

[2] Respondent's expropriation of Violet's property is the reason Violet was unable to turn its option with Vulcan into a completed deal to handle extensive cargo operations at the property.

could have acquired land bordering its existing facility, rather than a separate facility six river miles away.

3. This case also conflicts with *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), which *Kelo* recognized as a suspicious taking. Respondent tries to distinguish *99 Cents Only* by arguing that the government allegedly admitted its purpose to benefit Costco. Opp. at 33. As noted above, relying on a stated purpose test for distinguishing between permissible and impermissible takings eviscerates the limitations on government authority, allowing almost any property to be taken. Thus, Respondent has not offered a valid basis to distinguish the present case from *99 Cents Only Stores.*

4. Respondent's other excuses to justify taking Violet's property are baseless. For example, Respondent says that this case does not involve a "one-to-one taking" because Respondent intended to enter into a long-term lease with Associated, instead of transferring ownership. Opp. at 2, 25. There is no long-term lease exception to the prohibition against taking property from A to give it to B. This Court should reject Respondent's argument exalting form over substance.

Respondent also acknowledges that public ports often use private marine terminal operators ("MTO") to operate their facilities. Opp. at 31. This raises the question of why government involvement is even needed when private entities are responsible for port operations. Nevertheless, the fact that many government entities rely on MTO's to service their facilities does not alter the language of the Constitution to enable government to take a fully-functioning, profitable private business to give it to its preferred operator. The Public Use Clause does not contain an "others are doing it too" exception.

Finally, there is no merit to Respondent's contention that review should be denied because Louisiana has adopted anti-*Kelo* provisions. Opp. at 3, 23-25. The Fifth and Fourteenth Amendments still apply in Louisiana, regardless of any additional protections that may exist under state law. These are not mutually exclusive sources of protection.

C. State Laws Are Inadequate to Protect the Federal Constitutional Rights of Property Owners

Although *Kelo* generated much controversy and a strong political backlash in the states, scholars have studied the issue and concluded that state responses to *Kelo* have largely been symbolic and ineffective. *See, e.g.,* Ilya Somin, THE GRASPING HAND: KELO V. CITY OF NEW LONDON & THE LIMITS OF EMINENT DOMAIN 141, 145-53 (Univ. of Chicago Press 2015); Harvey M. Jacobs and Ellen M. Bassett*, All Sound, No Fury? The Impact of State-Based* Kelo *Laws*, 63 Planning & Envtl. L. 3, 7 (2011); *see also* James W. Ely, Jr., THE GUARDIANS OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 158 (3d ed. 2008) ("the effectiveness of these measures . . . remains uncertain"). Respondent cites no studies or authority to the contrary.

No matter how effective the state response has been, the state response "does not justify *Kelo*" or make up for this Court staying its hand instead of enforcing federal constitutional rights. *See* Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 205 (2018). The result in the present case proves that state laws are not sufficient; action from this Court is required. *See* Nicholas M. Gieseler & Steven Geoffrey Gieseler, *Strict Scrutiny and Eminent Domain After* Kelo, 25 J.

OF LAND USE 191, 213 (Spring 2010) ("the failure of even the most legitimate post-*Kelo* reformations is evidence of the need for judicial action").

Although Respondent emphasized how the Louisiana Constitution allegedly prevents takings "for predominate use by any private person or entity," "for transfer of ownership to any private person or entity," or "for purposes of operating [a business enterprise] or halting competition with a government enterprise," Opp. at 3-4 & 34 (citing La. Const. art. I, §§4(B)(1)&(6)), each of those limitations is treated as a fact issue to be decided by a locally-elected judge without a jury. *See* La. R.S. 19:4 ("[t]rial without jury except to determine compensation"); *see also* La. Const. art. I, §4(B)(5) (guaranteeing the right to a jury trial only on the issue of compensation). Moreover, the prohibition against takings for use by or transfer to private persons is also expressly subject to the exception granted to all political subdivisions in the state (except school boards) to take property in accordance with La. Const. art. VI, §21. *See* La. Const. art. I, §4(B)(1). Thus, Louisiana's anti-*Kelo* provisions do not provide meaningful protection for business owners whose property is expressly at risk of being taken for the use and benefit of other private entities.

D. This Is an Ideal Vehicle to Resolve the Issues

1. This case presents an ideal vehicle and clean factual record to address the legal standards that apply when a taking serves private interests. Respondent does not contest any of the key facts—*i.e.,* a one-to-one taking outside of a redevelopment plan, with Associated as the intended private beneficiary. When such private interest exists, does the deferential, rational basis standard still apply, as the Louisiana Supreme

Court holds? Pet. 13a. Does a higher standard apply? Are the circumstances sufficient to trigger "a presumption (rebuttable or otherwise) of invalidity," *see* 545 U.S. at 493 (Kennedy, J., concurring)? These are doctrinal issues of constitutional law with far-reaching implications. The Court should take this case to reconcile the founding principle that property may not be taken to further private interests, *see Calder v. Bull*, 3 U.S. 386 (1798), with the liberalization of the Takings Clause in *Berman*, *Midkiff*, and *Kelo*. Without this Court's guidance, states (like Louisiana) will continue to assume there are no federal limits on eminent domain powers.

2. Violet did not waive its first issue. Opp. at 13. Violet argued its constitutional challenges as a matter of law at each stage of the proceeding. For example, Violet's opening sentence in the Louisiana Supreme Court was: "This expropriation case presents significant unresolved issues of law under the Louisiana and United States Constitutions." *See* Violet's Original Writ Application to the La. S.Ct. at iii. After Respondent argued that the constitutional issues were mere fact questions, Violet responded:

> The question of what is or is not a prohibited purpose is a legal question controlled by the language of the Constitution. This Court should reject [Respondent]'s invitation to designate the local trial judge as the sole decision-maker on whether the Constitution was violated.

See Violet's Reply Br. to the La. S.Ct. at 3. Violet even presented its alternative position to the Louisiana Supreme Court, relying on cases from this Court to request application of the constitutional fact doctrine. *See id.* at n.3. And though not necessary, Violet gave

the Louisiana Supreme Court one more chance to fix its error by requesting rehearing. Accordingly, this issue is squarely presented for review.

3. The Louisiana Supreme Court's decision to reject Violet's Fifth Amendment challenge is not interlocutory. Opp. at 14-15. It is "final" under 12 U.S.C. §1257, even though the court remanded the case for additional proceedings on other issues. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612 (1989); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988).

Respondent filed its expropriation petition in 2010. Pet. 6a. After seven years of litigation and extraordinary expense defending its property rights, this Court should not make Violet wait any longer before addressing whether the taking was constitutional. Moreover, other property owners should not be subjected to such a burden litigating the standards that control when they contest the validity of a taking under the Public Use Clause.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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